A **PUTEH AMAN POWER SDN BHD**

v.

BITTERSWEET ESTATES (SABAH) SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[SUIT NO: S-22NCVC-953-10/2011]
16 FEBRUARY 2012

C ***CIVIL PROCEDURE:*** *Injunction - Mareva injunction - Damages for breach of sale and purchase agreement - Whether there were reasons to believe that company would dissipate assets - Monies paid under sale and purchase agreement dissipated to third parties - Whether courts may lift corporate veil to trace and injunct assets of company - Whether real risk of dissipation shown*

D ***CIVIL PROCEDURE:*** *Injunction - Mareva injunction - Variation of - Existing injunction insufficient to prevent dissipation of overseas assets - Whether necessary and just for injunction to be varied*

CONTRACT: *Breach - Sale and purchase agreement - Claim against shortfall - Sale of plantation land - Contract stipulating that 75% of land cultivated* E *with oil palm trees - Only 53.9 % planted with oil palm - Whether breach of warranty - Whether entitled to damages*

CONTRACT: *Interpretation - Contra proferentum rule - Whether inconsistent provision in agreement to be read in favour of adverse party - Whether* F *inconsistency in agreement - Whether contra preferendum applied*

CONTRACT: *Terms - Entire agreement clause - Whether existence of entire agreement clause prevents parties from referring to previous discussions, communications or agreements*

G The defendant company's sole asset was a plantation land measuring about 2,427 acres ('the land'). The plaintiff and the defendant entered into a sale and purchase agreement dated 11 May 2011 ('the said agreement') wherein the defendant sold to the plaintiff the land for a sum of RM30,337,500. The said agreement was concluded on H 27 September 2011. The plaintiff's claim herein was for purported breach of a warranty of cl. 16.1(d) of the said agreement and the plaintiff claimed damages of RM5.5 million against the defendant. The plaintiff alleged that pursuant to cls. 16.2 and 16.3 of the said agreement, the defendant had warranted that at least 75% of the land I was cultivated with oil palm trees. However, subsequently it was found that only 53.9% was planted with oil palm. Despite the said breach of warranty, the plaintiff proceeded with the performance of the agreement without prejudice to the plaintiff's right to claim for damages. Thereafter,

the plaintiff deposited RM18,708,546.37 with the defendant's solicitors for the agreement, Messrs Mariadass Lock & Ainuddin ('MLA') as stakeholder. Pursuant to cl. 9.1 of the agreement, MLA was to hold the monies as stakeholder until several conditions were fulfilled. The plaintiff had reason to believe that the defendant company was controlled by the Chetty family (Chetty Sevugan, Laksmi Sevugan and Meyappan Sevugan) and that it would be dissipating its assets. Hence, the plaintiff obtained an *ex parte* Mareva order to restrain the defendant from dissipating its assets. The *ex parte* Mareva order dated 6 October 2011 was served on the defendant and MLA. However, MLA informed the plaintiff's solicitors that MLA had released the whole of the balance purchase price to the defendant as early as 22 September 2011. The defendant revealed that it only had a total of RM119,245.32 in its bank accounts in Malaysia and that it did not have any other assets. Almost all of the balance purchase price was purportedly utilised to pay dividends, repay shareholders' advances, interest on shareholders' advances, legal fees and other purported expenses within a week of receiving the said balance purchase price. Enclosure 5 was the application by the plaintiff for an *inter partes* Mareva order. Enclosure 26 was the defendant's application to set aside the *ex parte* Mareva order dated 6 October 2011. Enclosure 31 was the plaintiff's application to vary the *ex parte* Mareva order dated 6 October 2012.

Held (allowing encls. 5 and 31 and dismissing encl. 26 with costs):

(1) Clause 21.6 of the said agreement was an entire agreement clause. With the benefit of legal advice, both parties had come to an agreement where they specifically provided that all previous agreements, understanding and communication had been superseded and parties should not look beyond the four corners of the agreement. Therefore, the defendant's argument with regards to the previous discussions, communications or agreements was totally irrelevant, in view of the entire agreement clause; *Master Strike Sdn Bhd v. Sterling Heights* (refd); *Yayasan Melaka v. Photron Corporation Sdn Bhd & Another* (refd). (paras 55, 56 & 57)

(2) If there was to be no representation as to the extent of the land to be developed with oil palm, then why would cl. 16.1(d) exist at all in the agreement. Therefore, it made sense that the word "as is where is" referred only to machineries and buildings as there was no representations, in the light of the other clauses. (paras 59 & 60)

(3) On the issue of the *contra proferentum* rule, whereby in the event there is an inconsistent provision in the agreement, it should be read in favour of the adverse party. The sale and purchase agreement was an agreement which was arrived at after both sides were advised by legal solicitors. Even if there was ambiguity in cls. 1.1,

16.1-16.3 was clear in that, the parties intended that the land be cultivated with oil palm. Reading all the clauses in its entirety there was no room for *contra proferentum* to apply. (para 70)

(4) To determine whether there is a risk of dissipation, the court may look at the conduct of the defendant and the manner in which the assets are being moved out of the jurisdiction of the court; *Pacific Centre Sdn Bhd v United Engineers (Malaysia)* (refd). (para 74)

(5) Courts have in cases involving a Mareva injunctions, lifted the corporate veil of the companies so as to trace and injunct assets ostensibly not belonging to the defendant in order to facilitate the granting of the Mareva injunctions and to ensure that the Mareva order granted is not in vain. (para 82)

(6) The reality warranted the lifting of the corporate veil. The Chetty family through Bittersweet Estates Sdn Bhd ('BESB') controlled the defendant. Most of the payment were made to BESB or Chetty Sevugan. Chetty Sevugan was not a shareholder of the defendant. Payment of more than RM10 million were made within the same day after the receipt of the money from the plaintiff. The entire payment of RM17,712,662.37 were purportedly used for payment of dividends, repayment of shareholders advances and interest on such advances just within seven days after receipt of payment from the plaintiff. The monies which were purportedly paid out to BESB and Chetty Sevugan were deliberately and hastily transferred out from the defendant so as to put it out of reach of the plaintiff. (para 93)

(7) All the plaintiff needed to show was that there was a real risk that the defendant will dissipate his assets with the object of putting them out of the plaintiffs reach thus stultifying any judgment that the plaintiff may recover. The plaintiff had shown that the defendant had moved out the funds to its holding company, BESB and Chetty Sevugan. There seemed to be a real risk that, in the event an injunction was not granted the plaintiff may be deprived of any remedy against the defendant; *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* (refd). (para 98)

(8) The defendant merely had RM119,245.32 in its bank account in Malaysia. The said injunction order was insufficient to prevent the defendant from dissipating its overseas assets. Therefore it was necessary and just, that the said injunction order be varied to cover assets of the defendant out of jurisdiction up to the sum of RM5,521,960 so as to prevent the defendant from dissipating its assets further and not to render any judgment obtained by the plaintiff be futile. (paras 121 & 122)

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd [1999] 4 CLJ 30 HC ***(refd)***

Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Re A Company [1985] BCLC 333 ***(refd)***

Third Chandris Shipping Corporation v. Unimarine SA [1979] 2 All ER 972 ***(refd)***

Yayasan Melaka v. Photran Corporation Sdn Bhd & Anor [2007] 7 CLJ 308 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74

For the plaintiff - Teh Meng Teck (Wong Sze Si with him); M/s Cheah Teh & Su
For the defendant - Norliza Rasool Khan (Fadhil Ihsan Mohd Hassan with her); M/s Zul Rafique & Partners

Reported by Amutha Suppayah

JUDGMENT

Zabariah Mohd Yusof J:

[1] Enclosure 5 is the application by the plaintiff for an *inter partes* Mareva Order.

[2] Enclosure 26 is the defendant's application to set aside the *ex parte* Mareva Order dated 6 October 2011.

[3] Enclosure 31 is the application by the plaintiff to vary the *ex parte* Mareva Order which was granted on 6 October 2012 for an order that the defendant, BESB but not limited to Messrs Mariadass Lock & Ainuddin or any of them, be restrained from removing from Malaysia, the assets of the defendants in Malaysia whether it be in the defendant's name or otherwise up to the value of RM5,521,960.

[4] Given the nature of the application and that they are all premised on the same facts, the three enclosures were heard together and the grounds for the decision of the same are stated herein below.

Background

[5] The defendant is a company incorporated under the laws of Malaysia with its business address at Sabah located at Solai Estate, Mile 22, Off Kim Loong Oil Mill Road, Keningau, Sabah.

[6] It is not disputed that the defendant's sole business was in palm oil plantation located in Sabah held under Country Lease No 155310115 District of Pensiangan, Sabah (hereinafter referred to "the land"). It is also not disputed that the sole asset of the plaintiff was the land.

[7] The land measures about 2,427 acres.

[8] The plaintiff and the defendant entered into a sale and purchase agreement dated 11 May 2011 (hereinafter referred to as "the said agreement") wherein the defendant sold and the plaintiff purchased the palm oil plantation for a consideration sum of RM 30,337,500.

[9] The said agreement was executed by the parties and it was concluded on 27 September 2011.

[10] The said land is currently held by the plaintiff.

[11] The plaintiff's claim herein is for purported breach of a warranty of cl. 16.1(d) of the said agreement and the plaintiff claims damages of RM 5.5 million against the defendant.

[12] By a Mareva Injunction application dated 3 October 2011, the plaintiff had obtained an *ex parte* Mareva Order against the defendant on 6 October 2011 restraining the defendant from disposing, dealing with its assets up to the amount of RM5,521,960.

[13] Subsequently an *inter partes* hearing of the Mareva Injunction (encl. 5) was set for hearing.

[14] At the same time the defendant filed an application to set aside the *ex parte* Mareva Injunction (encl. 26).

[15] Due to some change in circumstances, the plaintiff in turn filed an application for a variation order of the original Mareva Order dated 6 October 2011 (encl. 31).

[16] The terms of payment as stated in the said agreement for the consideration sum of RM 30,337,500 are as follows:

(i) 2% earnest deposit amounting to RM606,750 to be paid prior to the execution of the agreement;

(ii) 8% (ie, the remainder of the earnest deposit) amounting to RM 2,427,000 to be paid upon the execution of the agreement;

(iii) The remainder 90% of the consideration price, ie, RM27,303,750 minus RM8,595,203.63 paid to HSBC, to be paid upon the fulfillment of the disbursement condition set out in cl. 9.1.

[17] The plaintiff alleged that (pursuant to recital A and B and cl. 16.1(a), (d) and (t) and cl. 16.2 and 16.3 of the said agreement) the defendant had represented and warranted that at least 75% of the land is cultivated /developed with oil palm trees. A

[18] Subsequent to the execution of the said agreement on 11 May 2011, the plaintiff appointed Satscanners Sdn Bhd to conduct a survey on the land by way of satellite images and discovered that only 52.97% (520.29 hectares/1285.664 acres) is planted with oil palm which meant a shortfall of 22.03% (218.65 hectares/540.30 acres) land cultivated/ developed with oil palm. B C

[19] Following thereto the findings of Satscanners were confirmed by a physical survey conducted by Perunding Ukur Zakaria which reported that only 53.9% (529.28 hectares/1307.89 acres) was planted with oil palm which meant a shortfall of 21.1% (207.24 hectares/512.1 acres) of land cultivated/developed with oil palm. D

[20] The plaintiff informed the defendant of the said breach of warranty and representation that at least 75% of the land is cultivated with oil palm and that the plaintiff was in the midst of calculating its damages (exh. AR16 of encl. 3) of the affidavit in support. E

[21] Despite the said breach of warranty and representation, the plaintiff proceeded with the performance of the agreement, however this was without prejudice to the plaintiff's right to claim for damages from the defendant pursuant to cl. 16.4 of the agreement.

[22] Thereafter the plaintiff deposited RM18,708,546.37 with the defendant's solicitors for the agreement, Messrs Mariadass Lock & Ainuddin as stakeholder on 7 September 2011. F

[23] Pursuant to cl. 9.1 of the agreement, Messrs Mariadass Lock & Ainuddin was to hold the said RM18,708,546.37 as stakeholder until all the following conditions are fulfilled: G

(i) the purchaser (plaintiff) securing the Memorial Numbers for the registration of the Memorandum of Transfer and the charge(s) in favour of the defendant's financier from the relevant land office/ registry; H

(ii) payment of the redemption sum due to HSBC (the defendant's financier);

(iii) payment of all sums of monies which are due and payable by the vendor (the defendant) under the agreement, in particular but not limited to payments due to the authorities such as quit rent, assessment, utility bills and other lawful charges; I

A (iv) the purchaser (the plaintiff) or the financier securing the Memorial Numbers for the registration of the discharge of the charge by HSBC; and

(v) vacant possession of the property as well as the plant, equipment, machinery and vehicles as listed in annexure "A" of the agreement been delivered to the purchaser (the plaintiff) in accordance with cl. 8.1 and 8.2 of the agreement.

[24] Thereafter, with full knowledge that not all of the conditions as stipulated in cl. 9.1 has been fulfilled, Messrs Mariadass Lock & Ainuddin, *vide* its letter dated 15 September 2011 (exh. AR-27) threatened to release the balance purchase price prematurely to the defendant, if the plaintiff did not present the documents for the Memorandum of Transfer to the Land Office in Kota Kinabalu by 19 September 2011.

[25] The plaintiff, *vide* its solicitor's letter dated 15 September 2011 reminded Messrs Mariadass Lock & Ainuddin that Messrs Mariadass Lock & Ainuddin was holding the monies as stakeholder and that cl. 9.1(a) and (d) of the agreement had not been fulfilled yet. The plaintiff put Messrs Mariadass Lock & Ainuddin on notice that if Messrs Mariadass Lock & Ainuddin release the balance purchase price, they do so at their peril (exh. AR28) of the affidavit in encl. 14.

[26] In any event, the plaintiff's solicitor in Sabah did present the documents for the Memorandum of Transfer at the Kota Kinabalu Land Office on 19 September 2011.

[27] The plaintiff has reason, to believe that the defendant company appeared to be controlled by the Chetty family (Chetty Sevugan, Laksmi Sevugan and Meyappan Sevugan) and that the same would be dissipating its assets, the plaintiff had applied for an *ex parte* Mareva Order to restrain the defendant from dissipating its assets from the jurisdiction of this court, which was granted by the court.

[28] The *ex parte* Mareva Order dated 6 October 2011 was served on the defendant and Messrs Mariadass Lock & Ainuddin on 10 October 2011 and 7 October 2011 respectively.

[29] However Messrs Mariadass Lock & Ainuddin informed the plaintiff's solicitors on 12 October 2011 that Messrs Mariadass Lock & Ainuddin had released the whole of the balance purchase price to the defendant as early as 22 September 2011 (exh. ARI of encl. 3).

[30] The defendant also revealed in its disclosure affidavit in encl. 22 which was affirmed on 20 October 2011 that the defendant had only a total of RM119,245.32 in its two bank accounts in Malaysia and that

the defendant does not have any other assets (although the defendant's solicitors had stated that the whole of the balance purchase price was released on 22 September 2011).

[31] Further the defendant's affidavit in reply which was affirmed on 16 November 2011 (encl. 47) disclosed that:

(i) almost all of the balance purchase price received from Messrs Mariadass Lock & Ainuddin, ie, RM 17,712,662.37 was purportedly utilised to pay dividends, repay shareholders' advances RM10,344,033.65 to BESB and RM 572,450.03 to Chetty Sevugan) and

(ii) purported interest on alleged shareholders' advances;

(iii) legal fees to Messrs Mariadass Lock & Ainuddin and

(iv) other purported expenses,

within a week of receiving the said balance purchase price from Messrs Mariadass Lock & Ainuddin.

The Law On Mareva Injunction Application

[32] The law governing the granting of a Mareva Order is succinctly stated in the case of *Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd* [1999] 4 CLJ 30, whereby the applicant needs to satisfy the court:

(i) that the applicant has a strong arguable case;

(ii) that the defendant has assets within the jurisdiction; and

(iii) that there is a real danger that the defendant would dissipate its assets, whether by removal or disposal, as to render them unavailable or untraceable with the intention of stultifying any judgment or with the effect of defeating a claim.

Whether The Plaintiff Has A Strong Arguable Case

[33] The Court of Appeal in the case of *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754 held that a "strong arguable case" meant that the plaintiff has a fair chance of obtaining judgment against the defendant. The plaintiff need not satisfy the court that the plaintiff's case is so strong as to warrant summary judgment nor even a strong *prima facie* case to obtain a Mareva order.

The Plaintiff's Argument

[34] The plaintiff is relying on cl. 16.1(a), (d) and (t) read together with recital A and B and cl. 16.3, 16.4 to state that the plaintiff has a strong arguable case.

[35] Clause 16.1(a), (d) and (t) read together with recital A and B and cl. 16.3 of the agreement provide that the defendant had warranted and represented that 75% of the said land is cultivated with oil palm.

[36] The plaintiff had conducted two separate surveys (Satscanners and Perunding Ukur Zakaria) which confirmed that the said land was not 75% cultivated with oil palm.

[37] Clause 16.4 of the agreement entitles the plaintiff to claim for damages against the defendant for the said breach of warranty and representation.

[38] Further s. 74 of the Contracts Act 1950 specifically provides for a contractual party to claim for damages for breach of warranty.

The Defendant's Argument

(i) the sale of the land was on an "as is where is basis";

(ii) there is no misrepresentation or breach of warranty by the defendants;

(iii) the plaintiff is estopped from bringing its claim for breach of warranty.

[39] The defendant submits that the sale of the land was on "as is where is" basis. This was clear from the letter of intent dated 15 April 2011 (exh. AR9 at p. 80 of encl. 3) executed by the parties which were later incorporated into the agreement in cl. 1.1 which stipulates that:

> The vendor hereby agrees to sell and the Purchasers hereby agrees to purchase the Property with vacant possession together with the Palm Oil Plantation, equipment, machinery, plant, vehicles as listed in Annexure "A" herein on an "as is where is" basis and free from all caveats, charges, liens, pledges, mortgages, prohibitory orders, restrictions or any other encumbrances whatsoever nature at the purchase price of Ringgit Malaysia Thirty Million Three Hundred Thirty Seven Thousand and Five Hundred (RM30,337,500) only (hereinafter referred to as the "purchase price") based on the total size of the land and subject to the conditions herein contained and set forth.

[40] The defendant submits that during the course of concluding the agreement the parties discussed the issues of the land being the subject to a development order and the requirement for a confirmation from the relevant ministry on the condition as stated in the title of the land. This condition is that the land would be 75% developed.

[41] The requirement for the ministry's confirmation was subsequently included in the draft letter of intention.

[42] Solicitors for the defendant in fact informed the plaintiff's solicitors that "our client has enquired from the land office about this requirement and they have informed him that does not apply and they will register the transfer without any such approval." Thereafter, in order to avoid having to obtain the relevant ministry's confirmation and to ensure the land would be transferred and to proceed with the sale, the solicitors for the plaintiff proposed the inclusion of the warranty and representation *inter alia* that the land is developed in accordance with the terms and conditions set out on the title deed to the property.

[43] The defendant further submits that the whole intention and purpose of the warranty and representation that "the land is developed in accordance with the terms and conditions set out on the title deed to the property" was to ensure that the terms and conditions under the title would be met and that the land office proceed to transfer the land. The warranty was included in para. 5 of the letter of intent (p. 83 of the plaintiff affidavit affirmed on 3 October 2011 - encl. 3) and thereafter incorporated in the said agreement.

[44] It is to be noted that cl. 16.1(d) of the agreement stipulates that:

> the land has been developed in accordance with **the terms and conditions set out in the Title Deed to the Property** and the total developed area of the Land is at least 75% of the total area of the land.

[45] Further the defendant said in its submission that:

(i) The plaintiff had conducted a due diligence exercise of the land prior to the execution of the agreement; and

(ii) The plaintiff opted not to obtain the confirmation from the relevant ministry on the condition of the land. This can be seen from the email dated 14 April 2011 from the plaintiff's solicitors to the defendant's solicitors;

(iii) The land has been transferred into the name of the plaintiff which evidences that "the terms and conditions set out in the Title Deed to the Property" has not been fulfilled. Otherwise, the land transfer would not have been performed by the Land Office.

(iv) The land had been transferred on three different occasions. By a letter dated 15 August 2011 from the defendant's solicitor to the plaintiff's solicitor, the plaintiff was informed of this. (AR17).

(v) By a certificate dated 16 January 2001, the Pejabat Pertanian Daerah Pensiangan had certified that as of 14 January 2002, 1768.33 acres of the said land or 75% of the said land was cultivated. (exh. F).

[46] The defendant states that the purpose of cl. 16.1(d) was to ensure that the land would be transferred and this is particularly clear from the para. 16.3 of the said agreement that envisages that upon a breach of any warranty or misrepresentation specific performance or alternatively to terminate this agreement and claim damages.

[47] The defendant claimed that this is consistent with the fact that the warranty was to facilitate a transfer of the land, failing which the vendor was compelled to ensure the land was transferred or alternatively the said agreement could be terminated. The said agreement was performed and the warranty and representations were fulfilled the moment the land was transferred and no longer applicable.

[48] Hence the defendant states that such a construction of cl. 16.1(d) would be in consonant with cl. 1.1. Otherwise, the two clauses would be in conflict and render the said terms of the agreement absurd and illogical.

[49] The defendant submits that the factual matrix in this case shows that the warranty was included merely to ensure that the property would be transferred. The "as is where is" clause was always the intention of the parties from the very onset of negotiations as seen from the initial letter of intent. The warranty and misrepresentation at cl. 16.1 was subsequently included that "the land is developed in accordance with the terms and conditions set out on the title deed to the property" and must be construed in a limited manner consistent with cl. 1.1 or otherwise ought to be rejected.

[50] Further it was submitted on behalf of the defendant that, in any event, when there is an inconsistency between cls. 1.1 and 16.1(d) of the said agreement, the court ought to apply the *contra proferentum* rule. In this case since it is the plaintiff who had sought to include cl. 16.1(d) and as such, cl. 16.1(d) must be construed adversely against the plaintiff.

[51] Therefore based on the abovesaid the defendant submits that the plaintiff does not have a strong arguable case.

[52] My considered view is that bearing in mind that all the plaintiff needs to prove is "a strong arguable case", from the factual matrix of the case, I am inclined to say that there is indeed a strong arguable case on the part of the plaintiff.

[53] The argument of the defendant that the land was bought on an "as is where is basis" and therefore there cannot be misrepresentation on the part of the defendant, certainly cannot hold for the reasons stated hereinafter.

[54] The defendant had gone through the exchange of email and letters of intent starting from p. 23 at exh. A of encl. 27 all the way to pp. 32-33. These are the purported discussions that happened prior to the signing of the agreement in question.

[55] On this, it is pertinent to refer to cl. 21.6 of the said agreement which is found in encl. 3 exh. AR13 at p. 123 of the bundle. There is an entire agreement clause in the said agreement. With the benefit of legal advice, both parties came to an agreement where they specifically provide that all previous agreements, understanding and communication have been superseded and parties should not look beyond the four corners of this agreement.

[56] The Court of Appeal case of *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596 at p. 607 para (a) and *Yayasan Melaka v. Photran Corporation Sdn Bhd & Anor* [2007] 7 CLJ 308 illustrates the effect of an entire agreement clause where it puts to rest that any negotiations or agreement before the signing of the agreement is invalidated with the existence of the entire agreement clause.

[57] Therefore the argument by the defendant with regards to the previous discussions, communications or agreements (if any) is totally irrelevant, in view of this entire agreement clause.

[58] Even assuming for a moment that the plaintiff cannot rely on the entire agreement clause, the plaintiff's affidavit in encl. 38 at paras. 16-21, dealt with the suggestion that the parties have intended to take the land on an "as is where is" basis and that there is no representation with regard to the defendant's intention that 75% of the land is cultivated. The defendant had referred to cl. 1.1 to support what it says. However, it is necessary to read cl. 1.1 in its entirety, and not in isolation (at p. 102 of encl. 3 at exh. AR-13). Refer to p. 125 which is the annexure. From the reading of the words "as is where is basis" therein, my view is that it refers to the condition of the oil palm, equipment, machinery, plant and vehicles as listed in annexure A of the said agreement. "As is where is" basis does not refer to the land.

[59] Therefore it is the representation that 75% of the land is cultivated as set up in cls. 16.1(d). This is to be read with cl. 16.1(a) and recital "A" which gives commercial meaning to the cl. in 1.1. I am of the view that, this is a more logical an interpretation to be given, because if there was to be no representation as to the extent of the land to be developed with oil palm, then why would cl. 16.1(d) exist at all in the agreement.

[60] Therefore it makes sense in that, the word "as is where is" refers only to machineries and buildings as there were no representations, in the light of the other clauses.

[61] On the issue of the final letter of intent on an "as is where is basis", this was addressed by the plaintiff in para. 21 of encl. 38. What is of relevance is an email of 14 April 2011 where the plaintiff has clearly stated in that letter at exh. AR-5 at p. 55 which is in response to an earlier email referred to the defendant's solicitor, ie, 13 April 2011 letter at p. 56 and at p. 57 at cl. 4(c) and then the defendant's solicitor mentioned about the confirmation from the relevant ministry. What happened after this was that the defendant's solicitor then responded to the email of 13 April 2011 at p. 56. Their response was not accepted.

[62] Therefore, in the light of their response at p. 56, the plaintiff then responded on 14 April 2011 and they have basically in the email said that they are agreeable to delete the condition, subject to certain conditions which are as follows:

> (a) The **vendor provide a warranty** that the property has been developed in accordance with the terms and conditions set out on the title deed to the property ... (emphasis added).

[63] It is also a fact that the said agreement for the purchase of the land was premised on the defendant's numerous representations and warranties and not, as alleged without any warranties or on an "as is where is" basis. This is borne out by the fact that the express representations and warranties of the defendant ran into four pages of the said agreement.

[64] Following thereto, even if assuming for a moment that we disregard the entire agreement clause, the contents of the e-mail of the plaintiff still insists for the warranty. Hence, for the defendant to say that there was no misrepresentation as the land was sold on an "as is where is" basis is clearly misconceived.

[65] Next, is on the submission by the defendant that cl. 16.1 must be read with cl. 1.1 and that so long as the land is transferred to the plaintiff, the plaintiff would have no remedy. The defendant states that the sole object of the said agreement was to ensure that the land was transferred and once that was done the defendant would have fulfilled their obligation under the agreement. My considered view is that this argument cannot stand in the light of cl. 16.

[66] Clause 16.1(j) of the agreement provides for the representation. If the sole object of the agreement was just to transfer the title of the land from the defendant to the plaintiff, why bother at all to have the provision specifically on representations and warranties therein. It is also to be noted that there is also a representation by the defendant that the vendor has obtained all the approval.

[67] Further it is expressly stated in the agreement that the plaintiff is not buying bare land, but land together with structures and oil palm trees. A

[68] On the issue of due diligence conducted by the plaintiff, para. 23 of encl. 38 is referred wherein the plaintiff has categorically denied doing any due diligence, but merely conducting a review of the reports produced by the defendant such as production reports from the oil mill, equipment list, list of workers, copy of the grant and the defendant's outstanding debt to its bankers. That was the only extent of the due diligence conducted. Notwithstanding the positive assertion by the plaintiff, the defendant only aver a bare denial. Logically, for the plaintiff to conduct a due diligence on the land, the plaintiff would have to obtain permission/consent from the defendant to enter the land. Before the monies are paid the plaintiff does not have vacant possession. Notwithstanding this positive assertion on the part of the plaintiff, the defendant failed to produce any evidence that a due diligence was conducted whatsoever on the land. B C D

[69] Further the plaintiff had stated that the plaintiff had dispensed with the requirement to obtain a confirmation from the relevant ministry subject to the defendant providing to the plaintiff a warranty that the land has been developed in accordance with the terms and conditions of the title deed, which amongst others, stipulated that 75% of the land is cultivated, developed and maintained in accordance with good husbandry practice and that the defendant will procure an agriculture report in the event an agriculture is needed by the land office. The plaintiff's condition was communicated to the defendant *vide* an email on 14 April 2011 and the said warranties were subsequently included in the agreement at cl. 16.1(a), (d) and (e) of the said agreement. (refer to exh. AR13) E F

[70] On the issue of the *contra proferentum* rule, whereby in the event there is an inconsistent provision in the agreement it should be read in favour of the adverse party. The SPA is an agreement which was arrived at after both sides were advised by legal solicitors. The whole *contra proferentum* may apply if we do not have recital A, cl. 1.1. Even if there is ambiguity in cl. 1.1, cls. 16.1-16.3 is clear in that, the parties intended that the land be cultivated with oil palm. Therefore I am of the view that reading all the abovesaid clauses in its entirety there is no room for *contra preferendum* to apply. It can only hold water if cl. 16 recital A does not exist. G H

[71] Therefore from the above there is a strong enough arguable case for the plaintiff to stand on. To summarise: I

(i) The defendant had warranted and represented that 75% of the land is cultivated or developed with oil palm (cl. 16.1(a), (d) and (t) read together with recital A and B and cl. 16.3 of the agreement;

(ii) The plaintiff had conducted two separate surveys to confirm that the land was not cultivated on the ratio of 75% to support its contention that there was misrepresentation;

(iii) Clause 16.4 of the agreement entitles the plaintiff to claim for damages against the defendant for the said breach of warranty and representation;

(iv) Section 74 of the Contracts Act 1950 specifically provides for a contractual party to claim for damages for breach of warranty.

Whether The Defendant Has Assets In The Jurisdiction

[72] At the point in time when the application of the Mareva Injunction was made *ex parte*, Messrs Mariadass Lock & Ainuddin was supposed to retain the balance purchase price of RM 18,708,543.37 as stakeholder for the defendant and the plaintiff pending the fulfillment of all the conditions of cl. 9.1 of the agreement.

[73] However after the Mareva Order was served on the defendant, it was disclosed in the affidavit of the defendant that the defendant has a total of RM 119,245.32 as its total assets and received an additional sum of RM80,000 from the plaintiff as the consideration price of a case backhoe loader and for 1,000 bags of fertiliser which brings to a total value of RM199,245.32 which is within jurisdiction.

Risk Of Dissipation

[74] To determine whether there is a risk of dissipation, the court may look at the conduct of the defendant and the manner in which the assets are being moved out of the jurisdiction of the court.

[75] In the case of *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 Edgar Joseph Jr J quoted the case of *Third Chandris Shipping Corporation v. Unimarine SA* [1979] 2 All ER 972 where Mustill J said that:

> The whole object of the Mareva Injunction is that the Plaintiff proceeds by stealth so as to pre-empt any action by the defendant to remove his assets from the jurisdiction.

[76] Further Edgar Joseph Jr J said that:

> ... a Mareva applicant need only show that there is a real risk, or at least a risk, that the defendant will dissipate ...

[77] It is clear that upon the payment of the monies by the plaintiff the defendant had utilised a total of RM17,712,662.37 within seven days of receipt of the monies. These monies should not have been released yet by Messrs Mariadass Lock & Ainuddin as they were supposed to

hold the monies as stakeholder pending the fulfillment of certain conditions. Despite those conditions not being met, the monies were already released by Messrs Mariadass Lock & Ainuddin. According to the affidavit affirmed on 16 November 2011 of the defendant, these monies were purportedly used by the defendant to repay shareholders' advances, purported interest on shareholders' advances and purported dividends to its shareholders, BESB and the said Chetty Sevugam.

[78] It is pertinent to note that when the monies were paid to the defendant by the plaintiff, the defendant was already put on notice by the plaintiff that the plaintiff would be claiming damages from the defendant for breach of warranty and misrepresentation.

Lifting Of The Corporate Veil

[79] There had been payments made to the directors of the defendant and Bittersweet Estates Sdn Bhd (BESB) almost immediately after the defendant received payments of the land from the plaintiff. Bearing in mind the haste in which the monies were being disposed off by the defendant, the plaintiff invited the court to lift the Corporate Veil of the defendant, ie, the shareholding structure and constitution of the respective Board of Directors of the defendant and Bittersweet Estates Sdn Bhd (BESB), the majority shareholder of the defendant.

[80] The plaintiff raised the issue of the proceeds of the sale being utilised by the defendant to pay the directors advances and dividends and interests to the directors of the defendant within few days after the same was paid into the defendant's account. The defendant submits that what they do with their money is none of the business of the plaintiff. It is submitted by the defendant that the plaintiff has deliberately misled this court that the defendant is being controlled by one Chetty Sevugam together with his wife and son through Bittersweet Estates Sdn Bhd (BESB). The defendant submits that the plaintiff omitted to state that the shares of the defendant and BESB are divided into voting and non-voting shares. Chetty Sevugan together with his wife and son merely hold 49% shares in BESB.

[81] The defendant submits that the law allows this concept of separate legal entity. Defendant said that the plaintiff is not a creditor. The plaintiff admitted that it is not proven that there was a debt by the defendant to the plaintiff, however, the purpose of Mareva is not limited to proven claim.

[82] As far as the law is concerned, the courts have in cases involving Mareva Injunctions, lifted the corporate veil of the companies so as to trace and injunct assets ostensibly not belonging to the defendant in order to facilitate the granting of the Mareva Injunctions and to ensure that the Mareva Order granted is not in vain.

[83] In *Re A Company* [1985] BCLC 333, the English Court upheld a Mareva Injunction granted against the companies which were owned by shareholders of the defendant. The Court of Appeal stated that:

> ... the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.

[84] The Supreme Court in *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 reiterated the fact that:

> ... the court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case.

[85] I am mindful that the plaintiff's cause of action is not against BESB. However, it is pertinent to note that, it is a fact that BESB is the majority shareholder of the defendant.

[86] The important point for the court to consider is whether there is a risk of dissipation of the assets of the defendant put out of the reach of this court and that is a question of fact.

[87] It is a fact that there have been payments made out to BESB from the defendant immediately after the defendant had received payments from the plaintiff. Looking at the circumstances of the case that these are payments of dividends and advances to directors of the defendant and BESB so soon after it received payments from the plaintiff, I am of the view that it is necessary to lift the corporate veil of the defendant and examine the shareholding structure and the board of directors of the defendant and BESB.

[88] According to the CCM's records the Board of Directors of the defendant and BESB are as follows:

The defendant	BESB
Chetty Sevugan	Chetty Sevugan
Laksmi Sevugan	Laksmi Sevugan
Meyappan Sevugan	Meyappan Sevugan
V Krishnappan (local director)	V Krishnappan (local director)
Rama Narayanan (local director)	Rama Narayanan (Iocal director)

[89] Both companies do share common directors. A

[90] Further, the following are not disputed:

(i) BESB controls the defendant through its 69.98% stake in the defendant;

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(ii) The Chetty family holds 49% of ordinary shares in BESB, 7,155,500 (72.27%) preference shares and that one Chetty Sevugan Pension Plan & Trust owns 2,120,500 (21.41%) of the total 9,900,000 preference shares in BESB.

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[91] The plaintiff is not just relying on the fact that the defendant is controlled by the Chetty family (Chetty Sevugan, Laksmi Sevugan and Meyappan Sevugan) who are foreigners. The fact is that these foreigners controlled the boardroom of the defendant.

[92] It is not disputed that the plaintiff only dealt with Chetty Sevugan instead of the other two local directors despite the fact that Chetty Sevugan is a foreigner, in relation to the transaction of the land in question at all material times. D

[93] The Chetty family effectively and factually control the affairs of both the defendant and BESB. The Chetty family through BESB controls the defendant. In the course of the case management the defendant's counsel informed the court that she needed time to file the affidavits as the instruction came from the directors who are foreigners, when actually the defendant did have two local directors. This clearly shows who are in control of the defendant. Even just to have the disclosure affidavit filed so as to disclose where the balance purchase price went, it was mentioned by the solicitors of the defendant that the instruction was to come from these foreign directors. Hence, the reality warrants the lifting of the corporate veil. The manner in which the funds were firstly taken or transferred by the stakeholder and then on the same day more than RM10 million was paid out to related fund and shareholders who did not appear as shareholders. Below is the relevant parts of para. 10 of the defendant's affidavit affirmed on 16 November 2011 (encl. 47) to oppose the Mareva Injunction: E F G

> ... I state that on 23.9.2011 a sum of RM 17,712,662.37 was received by the defendant from its solicitors from the balance purchase price of the land of RM 18,708,546.37 upon deduction of all legal costs and disbursement in the amount of RM 997,634.00. The sums received were utilized as follows:

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		Credit	Debit
23.9.2011	Mariadass Payment	17,712,662.37	
23.9.2011	Interest Payment for shareholder advance to BESB		1,516,928.69
23.9.2011	Interest paid for shareholder advance to Chetty Sevugan		29,250.00
23.9.2011	Settlement of Shareholder Advance(BESB)		5,194,033.65
23.9.2011	Dividend payment		5,220,000.00
24.9.2011	Dividend payment		30,000
28.9.2011	Settlement of shareholder advance (Chetty Sevugan)		572,450.03
28.9.2011	Settlement of shareholder advance (Chetty Sevugan)		5,150,000.00
		17,712,662.37	17,712,662.37

[94] From the table, it is clear that most of the payments were made to BESB or Chetty Sevugan. This is clearly suspicious since it is not disputed that Chetty Sevugan is not in the records of CCM, a shareholder of the defendant. Payment of more than RM10 million were made within the same day after the receipt of the money from the plaintiff. The entire payments 17,712,662.37 were purportedly for dividends, repayment of shareholders' advances and interest on such advances just within seven days after receipt of payment from the plaintiff.

[95] Evidence shows that the monies which were purportedly paid out to BESB and Chetty Sevugan were deliberately and hastily transferred out from the defendant so as to put it out of reach of the plaintiff in the event of the plaintiff obtaining any judgment against the defendant.

[96] It has been shown that BESB and the defendant have common directors. Hence, it is logical to infer that the knowledge of the directors of the defendant, that the plaintiff would be claiming for damages against the defendant, would also be within the knowledge of the directors of BESB. Similarly the intention of the defendant to put the defendant's monies out of reach of the plaintiff so as to stultify any judgment which the plaintiff may obtain against the defendant must necessarily be imputed to the directors of BESB, given the identical board of directorship of the two companies.

[97] Accordingly, the monies purportedly paid to BESB and Chetty Sevugan were paid with the intention to put the monies out of reach of the plaintiff in the event judgment is entered in favour of the plaintiff.

[98] The proposition by the defendant that it is none of the plaintiff's business as to how the defendant spent the monies that was received by the defendant, is legally misconceived. All the plaintiff needs to show is that there is a real risk that the defendant will dissipate their assets with the object of putting them out of the plaintiff's reach thus stultifying any judgment that the plaintiff may recover. (see *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319, at p. 145).

[99] There are serious doubts and suspicions about the *bona fides* of the alleged payments said to have been made out by the defendant within days of the defendant's solicitors cum stakeholder, prematurely releasing RM17,712,662.37 to the defendant from the stakeholder's account on 23 September 2011.

[100] The disclosure by the defendant on the use of the balance purchase price clearly vindicates the plaintiff's fear that the defendant will take steps, and in fact has taken steps to stultify any judgment that the plaintiff may obtain.

[101] The defendant had admitted that their business had been sold and they are no longer in active business. Their only asset is oil palm plantation. They have sold the land and they have no other business. That being the case by moving the funds to the other company, what is left in the company is for the plaintiff to attach to in the event judgment is obtained against the defendant.

[102] Clearly the plaintiff has satisfied this test in showing that the defendant has moved out the funds to its holding company, BESB and Chetty Sevugan.

[103] Hence there seems to be a real risk that, in the event an injunction is not granted the plaintiff may be deprived of any remedy against the defendant.

Whether There Is Frank And Full Disclosure

[104] The defendant submits that the plaintiff failed to provide full and frank disclosure in its affidavit of all material facts within its knowledge which is:

(i) that pursuant to cl. 1.1 of the agreement, the sale was on an "as is where is basis"

(ii) that the condition to the title that the land must be 75% cultivated applies only to the first transfer by the first owner;

(iii) that the land has been sold and transferred to twice before prior to this sale by the defendant to the plaintiff;

(iv) that the plaintiff had conducted a due diligence of the land prior to the sale and opted to proceed with the sale nonetheless;

(v) that the plaintiff had not taken any steps to obtain a confirmation from the relevant ministry on the condition of the land prior to the sale;

(vi) that the Pejabat Pertanian Daerah Pensiangan had certified that as of 14 January 2002, 1768.33 acres of the said land or 75% of the land was cultivated.

[105] Hence the defendant submits that the Mareva Order ought to be set aside for failure on the part of the plaintiff to give a full and frank disclosure of the above material facts.

[106] With regards to para. (i) to (iv) above, these matters were raised and disclosed by the plaintiff in their affidavit in support of their application for the *ex parte* injunction before me, in encl. 3.

[107] As to the matters in para. (v) and (vi) above these are matters not material to the plaintiff's claim against the defendant for breach of warranty and representations.

The Undertaking By The Plaintiff

[108] The defendant submits that the undertaking by the plaintiff is worthless and in support of this averment the D referred to exh. I of encl. 27, ie, the CCM Search.

[109] However, this submission is unsubstantiated. Firstly, the plaintiff has stated categorically that they bought the land in cash of RM30 million and completed the transaction without having to obtain a loan from any financial institution.

[110] Secondly, to suggest the plaintiff's undertaking is worthless would require the court to disregard that the land had been sold to the plaintiff, which is unencumbered. At the very least, the plaintiff is now the owner of the land worth RM30 million.Hence there is no need to fortify any security because the plaintiff is financially strong.

Whether The Mareva Order Is Oppressive

[111] The defendant stated that the Mareva Order obtained by the plaintiff was oppressive in that it failed to provide day to day expenses or legal costs.

[112] However, at the time when the plaintiff applied for the Mareva Injunction the plaintiff had reason to believe that the RM18 million would be kept by the stakeholders. All that the plaintiff sought to restrain was merely RM5.5 million out of RM18 million that was

supposed to be retained by the stakeholders. If the plaintiff restrained the defendant's RM5.5 million, when the plaintiff knew at that point in time, that the defendant had approximately RM18 million being the balance purchase price, the plaintiff can hardly be accused of being oppressive in not providing them sufficient funds for their day to day expenses and their legal costs, since the defendant would have a change of about RM13 million.

[113] In any event, the defendant had gone on record to say that they are no more in active business, so what day to day expenses is the defendant talking about. The land had been sold and their business had been sold.

[114] If indeed the Mareva Order is oppressive as what the defendant has alleged, it is open for them to apply for a variation order to cater for legitimate expenses. However, this should not be a ground for setting aside a Mareva Order given the factual matrix of our case.

[115] The order that was sought by the plaintiff was for the defendant to be restrained from utilising and to disclose where their funds are, from the initial order. The plaintiff is not asking the defendant to disclose how they spent their money. The plaintiff is merely asking for an order to restrain only RM5.5 million.

The Application For The Variation Order

[116] The defendant in its affidavit in reply failed to disclose the whereabouts of the balance purchase price of RM18,708,546.37 which was held by Messrs Mariadass, Lock & Ainuddin as stakeholders earlier. The defendant had received RM20,583.37 from the plaintiff for the sale of the land after deducting the redemption sum to HSBC and other deductions.

[117] The defendant had also admitted that the sole business of the defendant was in oil palm plantation and the only asset of the defendant (which is the land) had been sold to the plaintiff and that the defendant is no longer in active business. From the disclosure affidavit of the defendant, and this fact is not being disputed, the defendant had only RM119,245.32 in its HSBC account and Public Bank account.

[118] Apart from this amount in the defendant's account, the defendant had failed to state the whereabouts of the balance purchase price which was paid by the plaintiff to the defendant.

[119] From the facts which had been adduced, the defendant had the knowledge of the plaintiff's intended suit against the defendant to recover damages for breach of warranty and misrepresentation, which caused the defendant's solicitors to prematurely and hastily release the balance

purchase price amounting to RM18,708,546.37 so as to enable the defendant to dissipate the available funds and render any judgment against the defendant nugatory.

[120] The conduct of the defendant clearly signify *mala fide* on the part of the defendant and its efforts to put out of reach of the plaintiff whatever monies that may likely be awarded to the plaintiff in any judgment.

[121] The order dated 6 October 2011 only covers the defendant's assets within this court's jurisdiction and in the light of the defendant's disclosure that the defendant merely has RM119,245.32 in its bank account in Malaysia, I am of the view that the said injunction order is insufficient to prevent the defendant from dissipating its overseas assets.

[122] Therefore it is necessary and just, that the said injunction order be varied to cover assets of the defendant out of jurisdiction up to the sum of RM5,521,960 so as to prevent the defendant from dissipating its assets further and not to render any judgment obtained by the plaintiff, be futile.

[123] This is in line with the principle as enunciated in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] CLJ (Rep) 319.

Conclusion

[124] Therefore based on the above:

(i) Enclosure 5 is allowed with costs.

(ii) Enclosure 26 is dismissed with costs.

(iii) Enclosure 31 is allowed with costs.